

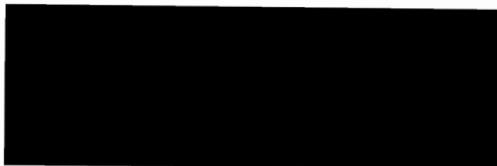
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U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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DEC 22 2006

FILE: LIN 05 223 50744 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for *Michael T. Kelly*
Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner operates a marketplace and cafe. It seeks to employ the beneficiary as a head cook. Accordingly, the petitioner endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b).

The record of proceeding before the AAO contains: (1) the July 20, 2005 Form I-129 and supporting documentation; (2) the director's July 29, 2005, request for evidence (RFE); (3) counsel's October 6, 2005, response to the director's RFE; (3) the director's October 24, 2005 denial letter; and (4) the Form I-290B and counsel's brief and documentation in support of the appeal. The AAO reviewed the record in its entirety before reaching its decision.

On October 24, 2005, the director denied the petition determining that the record did not establish that the proffered position is a specialty occupation. The issue before the AAO is whether the petitioner has established that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular

position is so complex or unique that it can be performed only by an individual with a degree;

- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Citizenship and Immigration Services (CIS) interprets the term "degree" in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position's title. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position nor an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

The petitioner states that it is seeking the beneficiary's services as a head cook. Evidence of the beneficiary's duties includes the petitioner's May 5, 2005 letter in support of the petition and counsel's October 6, 2005 response to the director's RFE.

At the time of filing, the petitioner stated that the beneficiary would have the following duties:

Supervise activities of other cooks and workers preparing foods to ensure economical and timely food production, teaching and implementing new tools and cooking techniques, inspection of cooking equipment and supervising the quality of food products. Furthermore, he will monitor food preparation methods, portion sizes, garnishing and presentation of food in order to ensure an efficient and profitable food service. He will also ensure that food is prepared and presented in an acceptable manner to our clientele.

He will be in charge of reviewing menus and analyzing recipes in order to determine labor and overhead costs. He will make recommendations to assigns [sic] prices to menu items. [The beneficiary] will also estimate food consumption and requisitions of foodstuffs and kitchen supplies. In addition, he will establish and enforces [sic] nutritional standards for dining establishments based on accepted industry standards.

In an October 6, 2005 response to the director's RFE, counsel for the petitioner indicated that the petitioner needed a highly specialized individual with at least a bachelor's degree in restaurant/hotel hospitality management to perform the following duties:

- Monitors compliance with health and fire regulations regarding food preparation and serving, and building maintenance in lodging and dining facilities;
- Plans menus and food utilization based on anticipated number of guests, nutritional value, palatability, popularity, and costs;
- Organizes and directs worker training programs, resolves personnel problems, hires new staff, and evaluates employee performance in dining and lodging facilities;
- Coordinates assignments of cooking personnel in order to ensure economical use of food and timely preparation;
- Estimates food, liquor, wine, and other beverage consumption in order to anticipate amounts to be purchased or requisitioned;
- Monitors food preparation methods, portion sizes, and garnishing and presentation of food in order to ensure that food is prepared and presented in an acceptable manner;
- Monitors budgets and payroll records, and reviews financial transactions in order to ensure that expenditures are authorized and budgeted;
- Investigates and resolves complaints regarding food quality, service, or accommodations;
- Reviews menus and analyzes recipes in order to determine labor and overhead costs, and assigns prices to menu items; and
- Establishes and enforces nutritional standards for dining establishments based on accepted industry standards.

Counsel also submitted an August 17, 2005 opinion authored by Fred T. Faria, an associate professor at Johnson & Wales University, in the Center for Food & Beverage Management, Hospitality College. Professor Faria opined, based on the job description provided, that the proffered position of head cook is similar to the occupation of kitchen manager and that a head cook or kitchen manager is an occupation for which a bachelor's degree in hospitality/food service management or a related field would generally be required. Professor Faria repeats portions of the job description and notes that some of these skills are taught in courses and bachelor of sciences degree programs of study in food service management. Professor Faria further opines:

The position of Head of Cooks or Kitchen Manager, such as the one noted, would generally require a Bachelor degree and a number of years of food service experience. A Bachelor degree in Hospitality/Food Service Management or related would generally prepare a student for an entry-level management position. In summary the major food service chains are now generally requiring a Bachelor degree for management positions, such as Head of Cooks or Kitchen Manager due to the nature of the specialized duties, responsibilities and complex knowledge required to perform the position.

Counsel also includes a Department of Labor's *Occupational Outlook Handbook (Handbook)* excerpt on food service managers, an excerpt from the *Occupational Information Network O*NET Online (O*NET)* on food service managers, and an excerpt from the February 24, 2003 *Interpreters Releases* on a non-precedential AAO decision regarding an executive pastry chef.

On October 24, 2005, the director denied the petition, determining that the petitioner had not explained how the duties of the proffered position were so complex that a baccalaureate degree in a specialized area would

be required to perform them. The director also noted that portions of the description relating to a lodging facility were inconsistent with the petitioner's stated business. The director found that the opinion of Fred T. Faria did not indicate that his opinion is based on any objective surveys, research, or statistics demonstrating that a baccalaureate degree is a minimum requirement for employment in the field. The director further determined, based upon a review of the *Handbook's* discussion of food service managers, that the *Handbook* did not report that a baccalaureate degree in a specialized area is a minimum requirement for employment in the field. The director noted counsel's reference to an unpublished AAO decision and also noted that it is not a precedential case and that the record of this proceeding is a separate matter. The director concluded that the evidence submitted is insufficient to establish that the proffered position qualified as a specialty occupation.

On appeal, counsel for the petitioner references the *Handbook's* report that most food service management companies recruit management trainees from two and four-year college hospitality programs and asserts that according to the *Handbook* a bachelor's degree or equivalent can be required for entry into the particular position. Counsel also contends that the director in this matter impermissibly heightened the standard of proof with respect to the Board of Immigration Appeals position that where a baccalaureate degree is usually the minimum requirement for entry into the occupation, the occupation may be considered a profession. Counsel avers that the director failed to consider Professor Fred T. Faria's opinion that is based on "his extensive experience and personal knowledge of the fact that for the 'food service operations hiring these graduates, a bachelor degree is a minimum requirement for that position.'" Counsel withdraws the unintentional reference to the petitioner as a lodging facility. Counsel also references the AAO's prior unpublished decision and requests that it be considered as guidance in support of the appeal. Counsel claims the director abused his discretion when determining the proffered position is not a specialty occupation, when determining the unpublished AAO decision is not binding, and by rejecting the expert opinion offered in support of the industry standard.

Counsel's assertions are not persuasive. Preliminarily, the AAO emphasizes that while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. The director correctly found that the unpublished AAO decision in another matter is not binding in the adjudication of this matter. In addition, the AAO reiterates that in the absence of all of the corroborating evidence contained in the record of proceedings of other matters including the description of the job duties, the AAO cannot find that the proffered position in this matter is parallel to the position of an executive pastry chef. Each nonimmigrant petition is a separate proceeding with a separate record. See 8 C.F.R. § 103.8(d). When making a determination of statutory eligibility CIS is limited to the information contained in the record of proceeding. See 8 C.F.R. § 103.2(b)(16)(ii). Moreover, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision.

The AAO now turns to a review of the duties of the proffered position to determine whether the position can be considered a specialty occupation.

The AAO turns first to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), whether a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position. The AAO routinely consults the Department of Labor's *Occupational Outlook Handbook (Handbook)* for its information about the duties and educational requirements of particular occupations. The *Handbook* states the following

with regard to the employment of food service managers, the position that mostly closely resembles the duties of the proffered position:

Food service managers are responsible for the daily operations of restaurants and other establishments that prepare and serve meals and beverages to customers. Besides coordinating activities among various departments, such as kitchen, dining room, and banquet operations, food service managers ensure that customers are satisfied with their dining experience. In addition, they oversee the inventory and ordering of food, equipment, and supplies and arrange for the routine maintenance and upkeep of the restaurant, its equipment, and facilities.

The *Handbook* continues:

Food service managers ensure that diners are served properly and in a timely manner. They investigate and resolve customers' complaints about food quality or service. They monitor orders in the kitchen to determine where backups may occur, and they work with the chef to remedy any delays in service.

Regarding the educational requirements of food service managers, the *Handbook* states:

Experience in the food services industry, whether as a full-time waiter or waitress or as a part-time seasonal counter attendant, is essential training for a food services manager. Many food service management companies and national or regional restaurant chains recruit management trainees from 2- and 4-year college hospitality management programs which require internships and real-life experience to graduate. Some restaurant chains prefer to hire people with degrees in restaurant and institutional food service management, but they often hire graduates with degrees in other fields who have demonstrated experience, interest and aptitude. Many restaurant and food service manager positions – particularly self-service and fast-food – are filled by promoting experienced food and beverage preparation and service workers.

Although the *Handbook* reports that a bachelor's degree in restaurant and food service management provides particularly strong preparation for a career in this occupation, the *Handbook* also recognizes that community and junior colleges, technical institutes, and other institutions offer programs in the field leading to an associate's degree or other formal certification. The *Handbook* notes that both two and four-year programs provide similar instructional courses and emphasizes that most employers have rigorous in-house training programs for management employees. Thus, the AAO concurs with the director's determination regarding the *Handbook's* report that food service managers do not require a bachelor's degree in a specific specialty. Instead, the *Handbook* recognizes several avenues leading to employment as a food service manager. The AAO acknowledges counsel's statement that a bachelor's degree or equivalent can be required for entry into the particular position; however, this statement does not establish that a bachelor's degree is normally a requirement for entry into this position. Rather it simply recognizes a bachelor's degree as one of several paths leading to employment as a food service manager.

The AAO also acknowledges counsel's reference to the *O*NET*; however, the AAO does not consider the *O*NET* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. The *O*NET* provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation.

The AAO has also considered the opinion offered by Professor Fred T. Faria in relation to the educational requirements of the occupation of a food service manager. Professor Faria states that it is his opinion that "[a] Bachelor degree in Hospitality/Food Service Management or related [field] would generally prepare a student for an entry-level management position," and "the major food service chains are now generally requiring a Bachelor degree for management positions, such as Head of Cooks or Kitchen Manager, due to the nature of the specialized duties, responsibilities and complex knowledge required to perform the position." The AAO does not disagree that a four-year program in hospitality or food service management would prepare an individual for an entry-level position; however, the issue is whether such a degree is normally required. The *Handbook* indicates it is not. Moreover, the professor couches his opinion in general terms and does not indicate definitely that the industry requires a four-year degree as a minimum for entry into the occupation of a head cook or kitchen manager. Further, the professor does not explain how the duties of the proffered position are so complex that prospective employees would be required to hold a baccalaureate degree or its equivalent for entry into the position.

In addition, as the director observed, the professor does not support his opinion with a factual foundation. The AAO acknowledges the professor's ten-year experience as a Department Chair of the Center for Food Service Management at the Hospitality College of Johnson & Wales University, but the professor has failed to provide surveys, research reports, or statistics to objectively quantify his opinion. His statements suggest that his conclusions are based on general anecdotal information. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). The *Handbook*, which offers an overview of national hiring practices, draws on personal interviews with individuals employed in the occupation, from websites, published training materials as well as interviews with the organizations granting degrees, certification, or licenses in the field, to reach its conclusions regarding the nation's employment practices. Professor Faria's opinion is insufficient to overcome the *Handbook's* report that not all employment in the food management field requires a degreed individual. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The petitioner has not established that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the proffered position. The petitioner has failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

The petitioner has not offered substantive evidence to establish that a specific degree requirement is common to the industry in parallel positions among similar organizations as required by the first prong of the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The only evidence submitted in this regard is the opinion of Professor

Fred T. Faria. As noted above, the professor provides general conclusions regarding the position of a head cook or kitchen manager. Moreover, the record does not indicate that the professor reviewed the petitioner's operations, visited the petitioner's work site, or interviewed the petitioner. While the AAO acknowledges that in some circumstances the position of a food service manager may require a bachelor's degree in hospitality management or a related field, the professor does not give sufficient details about the complexity of the duties or otherwise explain how the duties of the instant position require a four-year degree in a specific discipline to perform. Again, there is an inadequate factual foundation established to support the opinion.

The petitioner has also failed to establish the second prong of the second criterion. The record does not contain evidence that would show the proffered position is so complex or unique that only an individual with a degree can perform the position. The description of the duties of the proffered position is that of a food service manager, an occupation that does not require a bachelor's degree in a specific specialty. The AAO is not persuaded that the nature of the specific duties of the proposed position is more unique and complex than that of a typical head cook or that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree in the hospitality field. The opinion of Professor Faria is not sufficiently specific to establish either prong of the referenced criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) and the record does not contain other evidence to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor is there adequate evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), that the petitioner normally requires a degree or its equivalent for the position. The record does not contain evidence that the petitioner previously employed only degreed individuals in the position of head cook. Further, the AAO notes that while a petitioner may believe that a proffered position requires a degree, that opinion cannot establish the position as a specialty occupation. Were CIS limited solely to reviewing a petitioner's self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the employer required the individual to have a baccalaureate or higher degree. Accordingly, the petitioner has failed to establish the referenced criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) based on its normal hiring practices.

The duties of the proffered position do not exceed the scope of those performed by a food service manager, an occupation that does not require a specific baccalaureate degree. There is no evidence in the record sufficient to satisfy the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4); namely, that the petitioner establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The *Handbook* reveals that the occupation of a food service manager is an occupation that does not require a specific baccalaureate degree as a minimum for entry into the occupation. The petitioner has provided a general description of the duties associated with the proffered position but has not explained how or offered documentary evidence to substantiate that the nature of the duties is specialized and complex, beyond the routine duties of a food and beverage manager. Again, Professor Faria's opinion, based on the job description provided and his experience in teaching in the hospitality field, for the same reasons noted above is insufficient to establish that the proffered position is a specialty occupation for which a bachelor's degree in hospitality/food service management is required.

The petitioner has not established that the proffered position is a specialty occupation based on the criterion set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO disagrees with counsel's claim that the director heightened the standard of proof in this matter. The AAO emphasizes that the petitioner has failed to establish that the occupation of head cook as described in this matter is a specialty occupation based on normal educational requirements for the position, the industry standard as it relates to educational requirements for a parallel position, the nature of the specific duties of the position, or the past hiring practices of the petitioner for the proffered position. The petitioner has not established that a baccalaureate degree is usually the minimum requirement for entry into the proffered position. Neither counsel nor the petitioner have established that the proffered position's duties require the services of anyone other than a non-degreed employee to perform routine oversight of the food and kitchen portion of the petitioner's operation.

Beyond the decision of the director, the petitioner has not established that the beneficiary is qualified to perform the duties of a specialty occupation. The petitioner submitted an August 31, 2004 evaluation of the beneficiary's resume and letters verifying the beneficiary's prior employment. The evaluator from Foundation for International Services, indicates that the beneficiary's progressive employment experience is the equivalent of a bachelor's degree in hospitality management from a regionally accredited college or university in the United States. The AAO cannot agree. A petitioner may not rely on a credentials evaluation service to evaluate a beneficiary's work experience. A credentials evaluation service may evaluate only a beneficiary's educational credentials. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(3). To establish an academic equivalency for a beneficiary's work experience, a petitioner must submit an evaluation of such experience from an official who has the authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university that has a program for granting such credit. See 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). The petitioner has not provided the necessary evidence to establish that the beneficiary is qualified to perform the services of a specialty occupation.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); see also *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

Therefore, for the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position is a specialty occupation or that the beneficiary would be eligible to perform the duties of a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.